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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-630

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Appellants,

v.

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Appellees.

(continued on inside front cover)

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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ERRATUM TO JURISDICTIONAL STATEMENT

In the Jurisdictional Statement heretofore filed by Appellants herein, the following line was inadvertently omitted and should be inserted between lines 9 and 10 of the first full paragraph at page 18:

"specifically authorized to do so by Congress. *Oliphant*"

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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal involves several important questions relating to state taxing and police power as applied

on Indian reservations. The primary questions involve (1) the application and enforcement of Washington's cigarette and sales taxes to sales by reservation Indians to non-Indians, and (2) the application of Washington's vehicle excise taxes to vehicles owned by reservation Indians and driven *partly on and partly off* the reservation.

As such, this appeal involves many of the same questions answered by this Court in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), as well as several questions specifically reserved in that case.

The fundamental basis for the State's appeal is that the majority opinion below, if allowed to stand, effectively emasculates *Moe;* it would leave the continued viability of *Moe* to the whim of each Indian Tribe. Furthermore, taken to its logical conclusion, this reasoning could lead to the total destruction of state taxing power over non-Indians residing or conducting business on Indian reservations.

Therefore, in order for this Court to perpetuate its decision in *Moe*, and in order to dispose fully of the substantial questions of state taxing power on Indian reservations, it is necessary that this Court note probable jurisdiction of this appeal and set it for full briefing and argument.

OPINION BELOW

The opinion of the three-judge district court below is reported at 446 F.Supp. 1339. The judgment

comprises a consolidated decision,[1] filed February 22, 1978, and a declaratory judgment and decree of permanent restraint[2] filed May 10, 1978.

JURISDICTION

The action in No. 3868 was commenced on May 17, 1973, by the filing of a complaint by the appellee Indian Tribes seeking declaratory and injunctive relief against the application and enforcement of the State of Washington's cigarette and tobacco products excise taxes as applied to the Tribe and its members on the grounds that the application and enforcement of these taxes were invalid and repugnant to Art. I, §8, cl. 2 of the United States Constitution, the Washington Enabling Act, 25 Stat. 676, §4, the Indian Traders Act, 25 U.S.C. §261, *et seq.* The Tribes also sought declaratory and injunctive relief against the application of general state civil and criminal jurisdiction over the Colville Tribe and partial state assumption of civil and criminal jurisdiction over the Makah and Lummi Tribes, all of which were assumed pursuant to RCW chapter 37.12, on the grounds that such assumption of jurisdiction violated Art. I, §8, cl. 2 of the United States Constitution (the Indian Commerce Clause), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Washington Enabling Act, 25 Stat. 676, Wash. Const. Art. XXVI, §2, and Public Law 83-280 (18 U.S.C. §1162, 28 U.S.C. §1360).

[1] App. A. (Hereinafter references to the Appendix are to the separately printed Appendix filed with this Jurisdictional Statement.)
[2] App. B, C.

The action in Cause No. 3909 was commenced by the filing of a complaint on July 18, 1973, by the United States on behalf of the Confederated Tribes and Bands of the Yakima Indian Nation. The complaint sought declaratory and injunctive relief against the enforcement of state cigarette and tobacco products taxes on the Yakima Indian Reservation and the seizure of cigarettes and tobacco products in interstate commerce bound for the Yakima Indian Reservation on the grounds that such actions were repugnant to Art. I, §8, cl. 2 of the United States Constitution (the Commerce Clause) and the Fifth and Fourteenth Amendments to the United States Constitution. On April 25, 1974, the Yakima Indian Nation intervened on its own behalf.

Because the complaints sought injunctive relief against the enforcement of state statutes, a three-judge district court was convened pursuant to former 28 U.S.C. §§2281 and 2284. However, prior to the actual convening of the three-judge court, on November 5, 1973, the Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, issued a temporary restraining order enjoining the state from enforcing its cigarette and tobacco products taxes against the Tribes. On September 6, 1974, the full three-judge court issued a preliminary injunction enjoining the state from engaging in any action or acting in any manner to enforce its cigarette and tobacco products taxes against the tribes or their licensed retailers.

Nos. 3868 and 3909 were consolidated for purposes of trial. Subsequent to extensive discovery proceedings and briefing, the causes were tried upon stipulated facts as supplemented by deposition testimony and affidavits before the three-judge district court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the three-judge district court entered its consolidated decision.

On May 10, 1978, the three-judge district court entered the declaratory judgments and decrees of permanent restraint.

On May 19, 1978, the State filed a motion for partial new trial pursuant to FRCP 59(a).[3] This motion for a partial new trial was addressed to the issue of the State's ability to apply and enforce its cigarette and sales taxes on sales by the tribes to non-Indians.[4]

On July 10, 1978, the three-judge district court entered an order denying the State's motion for partial new trial.[5]

On July 12, 1978, the State filed a notice of appeal in Cause No. 3868 dealing with the motor vehicle excise tax issues and Public Law 83-280 assumption of jurisdiction issues decided adversely to the State by the three-judge court.[6]

On August 14, 1978, the State filed a notice of

[3]App. D.
[4]A petition for rehearing renders a district court's original judgment nonfinal for purposes of appeal for as long as the petition is pending. See, *United States v. Healy*, 376 U.S. 75 (1964); *United States v. Dieter*, 429 U.S. 6 (1976).
[5]App. E, F.
[6]App. G.

appeal in both Nos. 3868 and 3909 dealing with all the cigarette and sales tax issues decided adversely to the state by the three-judge court.[7]

On September 8, 1978, the State filed an amended notice of appeal in No. 3868 adding the motor vehicle and Public Law 83-280 issues decided adversely to the State to the cigarette and sales tax issues originally appealed on August 14, 1978.

Therefore, in accordance with Rule 13 of the Rules of the United States Supreme Court, appellants are required to file this jurisdictional statement within 60 days from the filing of the notice of appeal, i.e., on or before October 13, 1978.

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is confirmed by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const., Art. I, §8, cl. 2 (Commerce Clause); U.S. Const., Fourteenth Amendment (Equal Protection Clause).[8]

Wash. Const., Art. XXVI, §2.[9]

[7]App. H, J.
[8]App. K.
[9]App. L.

Washington Enabling Act, 25 Stat. 676, §4.[10]

25 U.S. §§1321-1326 (Civil Rights Act of 1968).[11]

Public Law 83-280 (67 Stat. 588; 18 U.S.C. §1162, 28 U.S.C. §1360).[12]

Washington State statutes.[13] RCW 82.08.020, -.30(4), -.050 (sales tax); RCW 82.24.020, -.030, -.040, -.050, -.080, -.260 (cigarette excise tax); RCW 82.44.020, -.110 (motor vehicle excise tax); RCW 82.50.400, -.410, -.510, -.540 (camper and travel trailer excise tax).

Washington administrative regulations.[14] WAC 458-20-192 (excise tax liability of Indians); ETB 504.08.192 (tax reporting requirements).

Colville Tribal Taxing Ordinance.[15]

Lummi Tribal Taxing Ordinance.[16]

Makah Tribal Taxing Ordinance.[17]

Yakima Tribal Taxing Ordinance.[18]

QUESTIONS PRESENTED

1. May a state impose upon an Indian tribe and/or its licensed Indian retailers the obligation to collect state excise taxes on sales of personal property on the reservation to non-Indian purchasers where the legal incidence of the tax falls upon the non-

[10]App. M.
[11]App. N.
[12]App. O.
[13]App. P.
[14]App. Q.
[15]App. R.
[16]App. S.
[17]App. T.
[18]App. U.

Indian, despite the fact that the tribe has adopted ordinances taxing these same transactions?

2. May a state impose upon an Indian tribe and/or its licensed Indian retailers the obligation to collect state excise taxes imposed on their sales of personal property to Indian purchasers other than members of the tribe occupying the reservation where the legal incidence of the tax falls upon the Indian, despite the fact that the tribe has adopted ordinances taxing these same transactions?

3. May a state impose upon an Indian tribe and/or its licensed Indian retailers making sales on the reservation to non-Indian purchasers, nondiscriminatory reporting and auditing requirements designed to insure that taxes collected on sales to non-Indians are properly accounted for?

4. Assuming the state has the authority to require Indian tribes and/or their licensed retailers to collect and remit taxes on their sales to non-Indians, may the state enforce collection of such taxes by confiscating as contraband cigarettes or other personal property within the state which are being shipped in interstate commerce to the Indian tribe for ultimate resale to non-members of the tribe?

5. May a state lawfully seize and levy upon property of Indian tribes to enforce tax collection responsibility for state taxes imposed against non-Indian purchasers?

6. May a state impose an excise tax on the privilege of using a motor vehicle with respect to

motor vehicles, travel trailers and campers owned by an Indian tribe or its enrolled members residing upon the reservation, where the motor vehicles are used *partly on and partly off* the reservation?

7. Does the State of Washington's assumption of partial territorial jurisdiction over Indian reservations pursuant to RCW 37.12.010 violate the Equal Protection Clause of the United States Constitution?[19]

STATEMENT OF THE CASE

The facts essential to a resolution of this appeal are not in serious dispute, and are fully set out in the opinion of the Court below.[20] Briefly summarized, the relevant facts are as follows.

A. **The Tribes and Reservations.** Appellee Indian tribes are duly recognized Indian tribes with a governing body recognized by the Secretary of Interior. With the exception of the Makah Tribe, none of the tribes are organized under the Indian Reorganization Act of 1934, 25 U.S.C. §476, *et seq.* Each of the tribes occupies a reservation entirely within the geographical limits of the State of Washington. The Lummi and Makah tribes are located in Western Washington on reservations established by treaties in 1855. The Colville Indian Reservation is located in Eastern

[19]This is exactly the same question presented to this court for resolution in the case of *State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, prob. juris. noted,* 46 U.S.L.W. 3541 (U.S. Feb. 27, 1978) (No. 77-388). Oral argument was held in this latter case on October 2, 1978. Therefore, although this issue is presented in this appeal, it will be controlled by the Court's decision in No. 77-388. Accordingly, no further mention of this issue will be made in this Jurisdictional Statement.

[20]The facts were established by stipulation of the parties, as supplemented by deposition testimony and uncontroverted affidavits.

Washington and was established by executive order in 1872. The Yakima Indian Reservation is also located in Eastern Washington and was established by treaty ratified in 1859.

The Lummi, Makah and Colville reservations are somewhat isolated and underdeveloped. Most essential goods and services are located off the reservation. Most Indian households on these three reservations own at least one automobile, and the three tribes own numerous motor vehicles. Many of these motor vehicles are operated both on and off the reservation.

The Yakima Reservation is less isolated and less underdeveloped than the Lummi, Makah, and Colville Reservations. The reservation population is approximately 27,000, about 6,500 of whom are Indians including 1,500 non-members of the tribe. All of the tribes suffer unemployment rates substantially above the state-wide average. The Colville and Makah tribes at the time of this litigation experienced unemployment rates of 33 and 60 percent, respectively. All of the tribes are desirous of developing their reservations to stimulate employment. In addition, the tribes run numerous programs designed to improve the economic well-being, health, education and social welfare of the tribes' members. These programs are financed in part by tribal tax revenues, chiefly tribally imposed taxes on the sale of cigarettes.

B. **Tribal Taxing Schemes.**

1. Colville, Lummi and Makah Tribes. The Tribes have adopted ordinances, approved by the

Secretary of Interior, adopting what the District Court termed a "* * * comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations."[21] Pursuant to these ordinances, the Tribes are essentially engaged in the retailing of cigarettes at tobacco outlets established on the reservation. Cigarettes are purchased from out-of-state wholesalers with federally restricted tribal funds and are shipped directly to the Tribes in interstate commerce. The Tribes then distribute cigarettes to their tribally licensed dealers for ultimate sale to consumers. The dealer at each tribal tobacco outlet is a federally licensed Indian trader. The cigarettes, under the terms of the ordinances, remain the property of the Tribe until sold to ultimate consumers.

Each Tribe levies a cigarette tax upon the distribution of cigarettes on the reservation. Apparently, the taxable event is the distribution of cigarettes from the Tribe to its licensed dealers. See, e.g., Colville Tribal Ordinance, §8, App. R. The Tribes' tax, which ranges between 40 to 50 cents per carton of cigarettes is required to be added to the retail price of the cigarettes.

2. Yakima Tribe. The Yakima Tribe has also adopted an ordinance regulating and taxing the sale of cigarettes. This scheme is slightly different from the scheme employed by the Colville, Lummi and Makah Tribes. Pursuant to its ordinances, the Yak-

[21] Consolidated decision, App. A, p. 8.

ima Tribe purchases cigarettes from wholesalers outside the state which it then wholesales to tribal members who have been licensed to run "smoke shops" on the reservation. The Tribe derives a profit of 1 cent per carton on each carton sold to its dealers. In addition, the Tribe imposes a tax of 22.5 cents per carton sold by the dealers.

C. **State Cigarette and Sales Taxing Scheme.** The State of Washington imposes a cigarette excise tax in the amount of $1.60 per carton. The tax is imposed pursuant to RCW 82.24.020 upon the sale, use, consumption, handling, possession or distribution of cigarettes. The tax is enforced by means of tax stamps. Retailers are required to either purchase prestamped cigarettes from wholesalers or purchase a supply of stamps from the state which are to be affixed to the cigarettes by the retailer prior to sale.

The cigarette excise tax is not applicable to sales to reservation Indians for their own use or for on-reservation resale to other Indians. See, WAC 458-20-192 and ETB 504.08.192, App. Q. It is only upon resale of cigarettes to non-members of the reservation tribe (chiefly non-Indians) that the State would require reservation retailers to affix state tax stamps and collect and remit the cigarette excise tax to the State. See, ETB 504.08.192.

Prior to the inception of this litigation, the State seized unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations. In the future, unless restrained, the State will continue

to seize unstamped cigarettes in the stream of interstate commerce bound for the Tribes' reservations to the extent that such unstamped cigarettes can reasonably be attributed to be for sale to non-members of the Tribe, or non-Indians.

The State also imposes a sales tax on the sale of tangible personal property and certain services at retail. During the time relevant to this litigation, the sales tax rate (combined state-local) was 5 percent. RCW 82.08.020. The sales tax is imposed upon the purchaser, and the retailer is required to collect the tax and remit it to the state. RCW 82.08.050. It is undisputed that the legal incidence of the sales tax is upon the purchaser, and that the sales tax applies to sales of cigarettes to non-Indians, absent some exemption based upon the federal constitution. The sales tax does not apply to sales to reservation Indians where delivery takes place upon the reservation. WAC 458-20-192.

D. **State Motor Vehicle, Travel Trailer and Camper Excise Taxing Scheme.** The State's motor vehicle tax (MVET) is imposed pursuant to RCW 82.44.020. It is an excise tax imposed for the privilege of using any motor vehicle in the state. During the time relevant to this litigation, the annual amount of the tax was 2 percent of the fair market value of the motor vehicle. RCW 82.44.020. The camper and travel trailer excise taxes are imposed pursuant to RCW chapter 82.50. The excise tax on campers and trailers is slightly different in enforcement, but in practical

operation and effect the tax is virtually the same as the MVET. The camper and travel trailer excise tax is an annual excise tax imposed on the privilege of using campers and trailers in the State of Washington, levied at an annual rate of 1 percent of the fair market value of the vehicle. RCW 82.50.400, -.410. When the tax is paid, a license is issued, entitling the camper or trailer to use of the state's public highways. RCW 82.50.540.

E. **Action of the Three-Judge District Court.** The three-judge district court began by deciding that it had jurisdiction over the parties and subject matter of the action. Recognizing that Indian tax exemptions normally raise questions only under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the court nevertheless found that the Tribes' claims for relief raised a substantial federal question under the Commerce Clause. Consolidated opinion, App. A, p. 14. This Commerce Clause claim was based upon the State's attempts to seize unstamped cigarettes moving in interstate commerce to the Tribes.

On the merits, the court began by analyzing the state cigarette taxing scheme as applied to sales by reservation Indians to non-Indians. The court found that the legal incidence of the state's cigarette and sales taxes fell upon the non-Indian purchaser. Consolidated decision, App. A, pp. 17-24. Thus, Washington's cigarette and sales taxing scheme was similar to Montana's cigarette taxing scheme at issue in *Moe*, *supra*; i.e., a tax imposed upon the purchaser to be collected by the seller.

The court next disposed of the Tribes' contentions that the state's cigarette taxing scheme had been preempted by federal legislation and policy underlying the Indian Traders Act, 25 U.S.C. §261, *et seq.*, the Indian Reorganization Act of 1934, 25 U.S.C. §476, *et seq.*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §450 and the Indian Financing Act of 1974, 25 U.S.C. §1451, *et seq.* The court found nothing in these acts which attempted to implement a federal policy by regulating a subject matter closely related to that touched on by the state's cigarette tax.

The court, however, held that the state's cigarette and sales taxing schemes (as applied to cigarettes) have been preempted by the passage of tribal ordinances regulating and taxing the sale of cigarettes and, furthermore, that the imposition of a state cigarette tax on top of a tribal cigarette tax interferes with the right of Indian self-government as articulated in *Williams v. Lee*, 358 U.S. 217 (1959).

The court found that the Tribes were exercising federally delegated power to tax non-Indians. The court found this delegation in section 16 of the Indian Reorganization Act of 1934, which delegates to Indian tribes those "powers vested in any Indian tribe or tribal council by existing law." According to the court, the power to tax Indians and non-Indians was a power vested in an Indian tribe by existing law, cit-

ing *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956). The court reasoned that since the tribal taxing scheme regulated the same subject matter as the state taxing scheme, the state's scheme must give way.

Alternatively, the court held that the state's cigarette taxing scheme constitutes an impermissible interference with tribal self-government. The court found that the economic effect of the combined state and tribal cigarette taxes would result in depleting the Tribes' tax base and possible elimination of essential revenues needed for tribally sponsored programs. The majority distinguished *Moe, supra*, on the grounds that in *Moe* there was no tribal tax and the tribe itself received no direct benefits from cigarette sales.

Judge Kilkenny, in dissent, found that *Moe* was indistinguishable. He noted that the only difference was appellee Tribe's decision to levy a tax on the sale of cigarettes. In his view, "[t]he mere imposition of a tribal tax does not rise to the level of a preemption of the taxing field on that article." App. A, p. 63.

The court found that the state sales tax, as applied to the sale of cigarettes, was similarly preempted. However, in Cause No. 3909, the court held that in the absence of a tribal tax on sales of articles other than cigarettes, the state's sales tax was not preempted, and Indian retailers could be required to collect and remit the tax to the state.

Finally, the court held that the state could not impose its motor vehicle, travel trailer and camper excise taxes upon vehicles owned by the tribes and their reservation resident members when such vehicles were driven partly on and partly off the reservation. The court found that Washington's vehicle excise taxes were no different in practical operation and effect from Montana's personal property tax on automobiles invalidated by this court in *Moe*. App. A, p. 42. Judge Kilkenny, again in dissent, reached no conclusion as to the validity of the state's vehicle excise taxes. In his view, the record is inadequate to rule on a tax falling between the on-reservation activity considered in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) and the off-reservation activity considered in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. **Whether an Indian tribe can preempt state taxing power over non-Indians on an Indian reservation is a federal question and involves fundamental questions concerning the status of Indian tribes in the American federal system of government.**

It is difficult to underestimate the importance of the federal questions involved in this appeal. Essentially, the court below has held that an Indian tribe, by the mere stroke of a pen, can preempt state taxing power over non-Indians engaged in economic activities on an Indian reservation. This holding goes far

beyond any rulings of this Court and results in a fundamental reallocation of powers among states, Indian tribes, and the federal government.

The political, social, and economic consequences of the lower court's holding are far-reaching. Solely in terms of political consequences, the holding elevates Indian tribes to the status of full sovereigns, with complete taxing and regulatory power over non-Indians residing or doing business on Indian reservations. Just last term, this Court held that Indian tribes possess no criminal jurisdiction over non-Indians and may not assume such jurisdiction unless *v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). As noted by the Court:

> "* * * Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*' " *Oliphant*, *supra*, 435 U.S. at 208.

Whether exercising the taxing power over non-Indians is inconsistent with the Tribes' status is an important federal question. It raises a number of troublesome questions about the rights of non-members of the Tribe paying a tax to a government in which that person has no right to representation. See, 1 Final Report of the American Indian Policy Review Commission, 179-181, 595-596 (1977).

> "Such [tribal] taxation raises the question of the rights of a nonmember of the tribe paying a tax to a government in which that person has no right to representation. Governments generally, however, may tax noncitizens without regard to representation when they are within the territorial jurisdiction of that government. However, where non-Indians live within the boundaries of the reservation and have no hope of ever becoming members of the tribal government, the issue is more difficult." Commission Report, *supra*, p. 179.

Whether Congress has in fact delegated to the Tribes the power to tax non-Indians is an important federal question. The lower court found that section 16 of the Indian Reorganization Act of 1934 did constitute congressional authorization for Indian tribes to exercise taxing jurisdiction over non-Indians, citing one circuit court opinion, *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956).

In contrast, this Court in *Oliphant* decided that section 16 of the Indian Reorganization Act did not constitute congressional authorization for tribes to assume criminal jurisdiction over non-Indians. Certainly, this Court must address the question of delegation of taxing power over non-Indians under the auspices of the Indian Reorganization Act. The state contends that Congress has never delegated this taxing power to an Indian tribe.

Another significant consequence of the holding below is the elevation of tribal governments to a position of political power far outstripping that of the states themselves. While it may be conceded that Indian tribes are "sovereigns" when dealing with members of the tribe on Indian reservations,[22] this

[22]See, e.g., *United States v. Wheeler*, ... U.S. ....., 98 S. Ct. 1079 (1978).

Court has never held that Indian tribes have greater power than states when dealing with non-Indians on Indian reservations. Assuming, arguendo, that Indian tribes do have the power to tax non-Indians, still there has been no decision of this Court which even remotely supports a holding that the tribes' taxing power — inherent or delegated — is superior to the state's taxing power over its own non-Indian citizens.

Lower courts which have considered this problem have uniformly applied principles of intergovernmental immunity from taxation in order to resolve conflicts between state and tribal taxing power over non-Indians. See, *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972); *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), cert. denied, 430 U.S. 983 (1977). The rationale of these decisions is simply that where two independent governments have taxing power, both taxes may be levied so long as neither is laid directly upon the other government or discriminates against the other government; *cf.*, *United States v. City of Detroit*, 355 U.S. 466 (1958).

The alternative, of course, is for a court to make a choice between governments or to hold that neither government has taxing power.

Whatever the ultimate result, the question of tribal preemption of state taxing power demands full briefing and argument before this Court. Both the Tribes and the State can fairly claim an interest in

taxing non-Indians on Indian reservations. Historically, states have freely taxed such non-Indians. *See* e.g., *Thomas v. Gay*, 169 U.S. 264 (1898); *United States v. McGowan*, 302 U.S. 535 (1938). Certainly, the imprimatur of this Court is required if states are to be ousted of this historically exercised power.

2. **Whether a state can impose nondiscriminatory reporting and auditing requirements on Indians designed to insure that taxes collected on sales to non-Indians are properly accounted for is a substantial federal question.**

The ability of a state to enforce a tax collection requirement against Indian retailers with respect to sales to non-Indians raises important questions pertaining to the exercise of state police power in aid of the taxing power. These enforcement questions were specifically reserved by this court in *Moe*. *See*, *Moe*, *supra*, 425 U.S. at 468, n. 6.

The State's record keeping requirements as applied to Indian tribes and Indian retailers are set forth in ETB 504.08.192. App. Q. All persons, including Indian retailers are required to keep detailed records of sales to Indians. Persons making sales to Indians are required to maintain books and records open to the State's inspection containing the names and tribal affiliation of Indian purchasers, the Indian reservations within which sales were made and the dollar amounts and dates of sales.

The court below held that these requiremnets, as applied to reservation Indians, violated the Indian Traders Act, at least insofar as reservation Indians

were licensed Indian traders. The lower court viewed this as an interference with the rights of Indian traders under the Indian Traders Act, citing *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965).

Warren dealt with state taxation of an Indian trader with respect to sales to reservation Indians. Here, the State is not attempting to impose a tax upon Indian traders with respect to sales to non-Indians. Rather, the State is attempting to enforce regulations which will aid the state in ascertaining the amount of sales to *non-Indians*. The record in this case reflects the fact that in excess of 90 percent of the cigarette sales in question were made to non-Indians. The State, in an attempt to make these record keeping requirements a truly "minimal burden", while at the same time insuring a manageable "audit trail" is merely requiring reservation Indians to account for 10 percent of their sales, rather than 90 percent of their sales.

Thus, in reality, the State's collection requirements do not conflict with the Indian Traders Act. In fact, requiring reservation Indians to account for sales to Indians is considerably less of a burden than requiring accounting for all sales to non-Indians.

Ultimately, the question of enforcement is one of state police power in aid of the taxing power. In *Moe*, the court found that the collection requirement was not a tax and did not frustrate tribal self-government. Furthermore, the *Moe* Court recognized that the

major beneficiary of the refusal of tribes to collect the state's tax was the non-Indian purchaser. Thus, fairly read, *Moe* stands for the proposition that where reservation Indians establish businesses within Indian country primarily for the benefit of non-Indians, the effect of which is to encourage, aid, and abet non-Indians in disobeying with impunity state tax laws, the state may exercise its police power jurisdiction over reservation Indians to the degree necessary to prevent such wholesale violations, so long as the exercise of such police power is not discriminatory or otherwise constitutionally suspect.

Here, there is no claim that the State's collection requirements are discriminatory. In fact the same rules apply to all retailers, whether Indian or non-Indian and whether located on or off an Indian reservation.

Thus, the question of whether the State has available to it the full range of its police power to assist in enforcing a collection requirement which this court has found to be lawful, is a substantial federal question. As Judge Kilkenny stated in his dissent:

> "I would hold that the State of Washington can validly impose the cigarette and sales tax in question and require the licensed dealers to account for the tax on all sales to non-Indians, keeping an adequate record of such sales. Because the tax, in my opinion, is legal, it follows that some type of a record must be kept."[23]

[23]The District Court did not deal with the question of the State's power to enforce collection responsibility by seizure and sales of unstamped cigarettes being shipped in commerce to Indian tribes

3. **Whether a state may impose taxes, the legal incidence of which fall upon a reservation Indian who is not a member of the tribe occupying the reservation, is a substantial federal question.**

The lower court held that the State is without power to tax reservation Indians who are not members of the tribe occupying the reservation. The court based its holding upon the opinion of the District Court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F.Supp. 1297, 1312 (D. Mont. 1975). However, the issue of state taxing power over nonmembers of the tribe was not before this Court in *Moe*, and this Court expressed no opinion as to the lower court's holding. *See, Moe, supra*, 425 U.S. at 480, n. 16.

In simple terms, the question is whether the federal government has preempted the field of state taxation of Indians who have left their own reservations. This question must be decided with reference to the particular treaties and federal statutes which define the limits of state power over Indians. *McClanahan v. Arizona Sate Tax Commission*, 411 U.S.

for ultimate resale to non-members of the tribe. Nor did the District Court rule on whether the State could enforce a collection responsibility by seizure and sale of property belonging to the tribe or to individual members thereof. It was not necessary to reach these questions with respect to the cigarette taxing issues, because the court held the State could not impose its tax. In those circumstances where the State could impose its tax, the court assumed that the tribe would voluntarily comply. These two enforcement issues have been raised on appeal. However, since the court below did not rule on these issues, the State expects that this Court, in accordance with its long established custom, will not rule on these issues. However, the State wishes to make it clear that it is not abandoning on appeal its contentions with respect to these issues. In the event this Court decides state taxing power has not been preempted, it will be necessary to remand the case back to the District Court for consideration of these enforcement issues.

164 (1973). And, of course, absent clear statutory guidance, courts will not imply tax exemptions. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The lower court cited no treaty rights or federal statutes in support of its holding that Indians who are not members of the tribe are entitled to exemption from state taxation. Lower courts which have considered the problem have held that Indian tax immunities apply to Indian persons who reside on reservations but are not enrolled members of the tribe occupying the reservation. *Fox v. Bureau of Revenue*, 87 N.M. 261, 531 P.2d 1234 (1975), cert. denied, 424 U.S. 933 (1976); *Dillon v. Montana*, 451 F. Supp. 168 (D.Mont. 1978). The rationale of these decisions is that federal statutes authorizing federal court jurisdiction over crimes committed by Indians on another tribe's reservation (e.g. 18 U.S.C. §1153) and the definition of "Indian" for purposes of the Indian Reorganization Act (25 U.S.C. §479), manifest congressional power over Indians whether or not on their own reservations.

The State does not dispute that Congress has assumed jurisdiction for certain purposes over Indians residing on another tribe's reservation. Indeed, Congress has assumed jurisdiction over Indians not residing on any reservation. *See*, e.g., *Morton v. Ruiz*, 415 U.S. 199 (1974), in which the Court construed 25 U.S.C. §13, dealing with expenditures by the BIA

for general assistance to Indians, to encompass and authorize the expenditure of federal funds for non-assimilated needy Indians residing *on or near* an Indian reservation.

It is the State's position that these congressional enactments do not require this Court to find a tax exemption by implication for such non-tribal Indians.

4. **Whether a state can impose an excise tax on vehicles owned by reservation resident Indians and driven partly on and partly off the reservation is an important federal question.**

The court below held that the State could not impose its motor vehicle, camper, and travel trailer excise taxes on vehicles owned by the Tribe and its reservation resident members and driven partly on and partly off the reservation. The court based its holding upon this Court's decision in *Moe*, in which this Court held that Montana could not impose its personal property tax on automobiles owned by reservation resident members. This Court's holding in *Moe* was based upon the rule of *McClanahan v. Arizona State Tax Commission*, *supra*, denying states the power to impose taxes upon reservation Indians, the legal incidence of which falls upon such reservation Indians, with respect to activities or property located wholly within an Indian reservation.

It is the State's position that *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and not *McClanahan*, controls this issue. In *Mescalero*, this Court sustained New Mexico's gross receipts tax as

applied to the conduct of a tribally owned ski resort business located outside reservation boundaries. The general rule, as summarized by this Court in *Mescalero*, *supra*, 411 U.S. at 148-149 is:

> "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state."

Here, the legal incidence of Washington's vehicle excise taxes falls upon the owner of the vehicle. So long as the vehicle is used entirely on the reservation, *McClanahan* dictates that no tax can be imposed. However, because there are no express federal laws to the contrary, the State contends that it may impose its vehicle excise taxes at the time the vehicles are used off the reservation.

This is an important federal question. It falls precisely between the totally on-reservation activities considered by this Court in *McClanahan* and the totally off-reservation activities considered by this Court in *Mescalero*. Full briefing and argument is needed on this question to enable this Court to articulate the circumstances under which reservation Indians going beyond reservation boundaries may be subject to this State's tax laws.

CONCLUSION

The federal questions raised in this appeal are clearly substantial. They require briefs on the merits and oral argument for proper consideration and resolution. The State submits that the decision of the District Court is directly contrary to the reasoning and result of this Court's decision in *Moe*. If allowed to stand, the decision would leave the continued viability of *Moe* to the whim of each Indian tribe. Furthermore, the decision below elevates Indian tribes to the position of sovereign nations, a concept which has been rejected by this Court for over 100 years.

Therefore, in order for this Court to protect the integrity of its decisions, and in order to dispose fully of the substantial questions of state taxing power on Indian reservations, it is necessary that this Court note probable jurisdiction of this appeal and set it for full briefing and argument.

DATED this 13th day of October, 1978.

Respectfully submitted,

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